Editor's note: 85 I.D. 81

JOHN R. DEAN

IBLA 77-113 Decided April 26, 1978

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting homestead entry application and final proof. AA-8213.

Set aside and remanded.

1. Alaska: Homesteads--Applications and Entries: Priority--Homesteads (Ordinary): Applications--Homesteads (Ordinary): Lands Subject to

   The rejection of a homestead application in Alaska merely because there are prior-filed homestead applications for the same land is improper and premature where no action has been taken on the conflicting applications. If a prior-filed application is allowed, the land comes within an allowed entry of record and a junior application must be rejected thereafter. However, if the prior application is rejected or withdrawn, it no longer bars allowance of a junior application.

2. Alaska: Homesteads--Homesteads (Ordinary): Generally--Homesteads (Ordinary): Final Proof

   A homestead claimant in Alaska may be given credit for residence, cultivation

and improvements after the time his homestead application is filed but before allowance of entry where the land was subject to appropriation by him or included in an entry against which he had initiated a contest resulting in cancellation of the entry.

3. Alaska: Homesteads--Applications and Entries: Generally--Homesteads (Ordinary): Final Proof--Words and Phrases

"Subject to appropriation by him." The provision in 43 CFR 2511.4-2(a) permitting credit for residence and cultivation by a homestead entryman before the date of entry if during that period the land was "subject to appropriation by him" does not refer to land for which there were prior-filed homestead applications which are subsequently withdrawn or rejected. Therefore, until action is taken on prior-filed applications, final proof filed by a junior homestead applicant should not be rejected merely because the land is subject to the prior applications.

4. Alaska: Homesteads--Homesteads (Ordinary): Final Proof

The mere fact homestead final proof in Alaska is filed before allowance of the homesteader's application for entry does not preclude consideration of the final proof if entry is allowed.

APPEARANCES: John R. Dean, Anchorage, Alaska, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The appeal in this case arises from the following facts reflected on the record of the Alaska State Office, Bureau of Land Management (BLM): appellant, John R. Dean, filed homestead entry application AA-8451 for 100 acres of land in Alaska on August 14,

1973. On November 1, 1973, he amended the application by adding another 40 acres. No action on his application was taken by the BLM. Subsequently, on December 23, 1974, Dean filed commuted final proof of compliance with the requirements of the homestead laws. Dean's application conflicts with parts of two other applications for homestead entry filed previously to him: AA-8196, filed by Glenn W. Price on October 24, 1972, and AA-8312, filed by Deborah L. Angel on November 13, 1972.

The decision by the BLM Alaska State Office of December 8, 1976, rejected Dean's application for homestead entry and his final proof. The rationale for this action was that the prior-filed applications segregated the lands from appropriation, citing Albert A. Howe, 26 IBLA 386 (1976). The decision also noted that Dean had not taken action under 43 CFR 4.450-1 (pertaining to private contests) so as to obtain a preference right of entry against the settlement of Deborah L. Angel.

Dean objects to the BLM action, asserting he did everything he could to attempt to ascertain if there were conflicting claims to the land before he filed his application. He states that while he was living on the land, Deborah L. Angel approached him stating she had a prior right but was going to waive her rights to him, that Glenn W. Price informed Dean's wife he was unable to occupy the land, and that these visits were the first time he was aware of any prior existing rights. He decided to remain on the land

because it did not appear anyone else would perform the requirements for a homestead entry. He points to the efforts he has made on the property. He contends, in effect, that if those having prior rights do not fulfill the requirements, he should be entitled to the land.

There is no indication in this record that the BLM State Office in Alaska adjudicated the prior-filed applications before they rejected Dean's application. Instead, it appears that they took action on his application only because he filed his final proof. The rejection of Dean's application and the final proof was premature.

[1] Let us first consider the rejection of the homestead application. The case cited in the BLM decision, Albert A. Howe, supra, and a subsequent decision Richard T. Pope, 27 IBLA 33 (1976), decided whether a homestead application in Alaska may constitute a "valid existing right" which is excepted from the effect of a withdrawal of land. They ruled that a homestead application which is allowable constitutes such a right and a withdrawal does not bar allowance of the application. The Pope and Howe cases, in turn, relied upon Raymond L. Gunderson, 71 I.D. 477 (1964), and similar cases, which dealt with the issue of whether the requirements for making a second homestead entry must be met by an applicant who had previously filed a homestead application but who relinquished the application before entry was allowed. In departing from previous departmental rulings because of a change in regulations, Gunderson held that an allowable

homestead application is considered the equivalent of an entry and thus the rules pertaining to filing second homestead entries must be satisfied. In that case, the appellant had two concurrent homestead applications totaling more than the allowable acreage. The decision held that the filing of two concurrent applications by the same person bars allowance of either since the acreage exceeds that allowed by law. However, if one application is relinquished, the other (not having excess acreage) could now be allowed if there were no intervening rights. Specifically, the decision states, at 485:

> * * * the appellant's application could receive no priority during the period from March 10, 1961, to April 7, 1961, during which time he had two applications of record for a total of 240 acres. Had another valid application been filed during that period for any of the same land, it would have been entitled to priority over the appellant's application. In the absence of such an intervening claim, however, the appellant's application is not disqualified by virtue of the earlier application and is entitled to consideration with priority dating from April 7, 1961, when the first application was relinquished.

Thus, the Gunderson case recognizes that a subsequent application filed while homestead applications are pending may be allowed if the prior applications must be rejected. To the same effect is Samuel A. Wanner, 67 I.D. 407 (1960), where the syllabus states:

> When a valid application for a homestead entry is filed and an amended application is later filed for the same and additional land, which amended application is invalid because it contains excess acreage, the applicant loses his priority over an intervening applicant as to land included in his original application and in the intervening application.

In Wanner, a homestead applicant had amended his first-filed application after an intervening application was filed and the amendment caused the first application to contain excess acreage. The homestead entry allowed to the first applicant was to be canceled only as to lands in conflict with the intervening application if the intervening application were allowed for the conflicting lots. These cases demonstrate that the action by the Bureau in the present case was premature in rejecting Mr. Dean's application. 1/

As I pointed out in my separate opinion in Howe, at 26 IBLA 391, the reason for the rule that a homestead application may be considered the equivalent of an entry so far as the applicant is concerned rests upon the application of the doctrine of relation back. Thus, when a patent is issued, and also when an entry is allowed, the rights of the applicant are deemed to go back to the date of the original application. White v. Roos, 55 L.D. 605 (1936); Rippy v. Snowden, 47 L.D. 321 (1920). The rule is applied to protect the applicant from intervening claimants. It is only applicable, of course, if the application is allowed. Obviously if a prior-filed application is rejected

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1/ See also Ernest J. Ackermann, 70 I.D. 378 (1963), where the syllabus states:

"Where a homestead settler on unsurveyed public land in Alaska initiates his homestead claim by settling upon the land while it was subject to the homestead entry of another and subsequently files notice of such settlement in the land office after relinquishment of the prior entry, his rights attach instantly on the filing of the relinquishment of the existing homestead and are superior to the rights of a homestead settler who files his notice of settlement and settles on the land subsequent to the relinquishment."

or withdrawn there are no rights to be protected and a subsequent application may be allowed. If, however, the prior-filed application is allowed, the date of the entry for the purpose of protecting his rights against intervenors would relate back to the date of his application.

There is no regulation providing for the rejection of a homestead application merely because there is a senior homestead application for the same land. Regulation 43 CFR 2091.1 requires rejection of an application if land is in an "allowed entry or selection of record." Therefore, if a prior application is allowed the land becomes within an entry and conflicting applications must be rejected. A homestead application cannot be considered an "allowed entry or selection of record" until there is adjudicative action by BLM approving and "allowing" the entry pursuant to the application.

From the foregoing discussion it is evident that a homestead application in Alaska may not properly be rejected merely because it conflicts with a prior-filed application, unless and until an entry is allowed. Accordingly, adjudication of Dean's application was premature and must be set aside.

[2] We turn now to the rejection of the final proof. It was rejected because the homestead application was rejected. That reason is now moot by our ruling on that issue. A question remains as to whether rejection of the final proof would be proper, in any

event, where it is filed before the application for the homestead entry has been allowed. The answer to this is found by considering the purpose of final proof and how rights are acquired under the homestead laws applicable to Alaska.

Obviously, the filing of final proof is the pre-requisite for obtaining a patent to land entered under the homestead laws. A proper final proof would make a prima facie showing of compliance with the homestead laws at the time it is filed. The final proof is the final step of the homestead applicant to secure his rights. The first step for a homesteader is to initiate his homestead claim. The regulations set forth how claims in Alaska may be initiated and how credit may be given for military service as a substitute for certain requirements:

> * * * Claims in Alaska under homestead laws may be initiated by settlement on either surveyed or unsurveyed lands of the kind mentioned in the foregoing section. Claims may also be initiated on surveyed lands of that kind by the presentation of an application to enter. [43 CFR 2511.2(a)(1).]
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> * * * Any person having a valid homestead settlement claim, or any person who has made homestead application for public lands which is allowed after the date of the filing thereof, or any homestead entryman whose application has been allowed, who after such settlement, application or entry enters the military service, is entitled, in the administration of the homestead laws, to have his military service construed to be equivalent to residence and cultivation upon the tract settled upon or entered, for the period of such service. * * * No patent will issue, however, until he has resided upon, improved and cultivated his homestead for a period of at least 1 year. * * * [43 CFR 2096.2-5(a).]

The problem concerning appellant's final proof (apart from whether it makes a prima facie showing of compliance with the homestead laws) is that it was filed before his application for entry was allowed and in the absence of a notice of settlement being filed. To comprehend the problem, let us suppose that we were not faced with the question of the prior-filed applications. The facts otherwise would be the same, namely, the filing of a homestead application, no action taken thereon by BLM, and then over a year later the filing of commuted homestead final proof. If, instead of the homestead application, a notice of settlement had been filed and the lands were then open for settlement, there would be no problem. With the reduction in requirements because the entryman was a veteran, if the final proof was acceptable on its face, there would be an equitable right to a patent, defeasible only through contest proceedings establishing that the requirements of the law had not in fact been met. Thus, the issue becomes whether the filing of an application for entry, rather than a notice of settlement, requires rejection of final proof filed before action is taken on the application.

With specific regard to settlement claims 43 CFR 2567.2 provides:

> (b) Notice of settlement. (1) A person making settlement on or after April 29, 1950 on unsurveyed land, in order to protect his rights, must file a notice of the settlement for recordation in the proper office for the district in which the land is situated, and post a copy thereof on the land, within 90 days after the settlement. Where settlement is made on surveyed lands, the settler, in order to protect his rights, must file a notice of the

> settlement for recordation, or application to make homestead entry, in the proper office for the district in which the land is located within 90 days after settlement.
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> (3) Unless a notice of the claim is filed within the time prescribed in subparagraph (1) and (2) of this paragraph, no credit shall be given for residence and cultivation had prior to the filing of notice or application to make entry, whichever is earliest. [Emphasis added.]

Regulation 43 CFR 2567.2 quoted above echoes the requirements of the Act of April 29, 1950, as it amended the law extending homestead laws in Alaska by requiring that a notice be filed by the settler within 90 days of settlement. 43 U.S.C. § 270 (1970). That Act also provided the effect to be given to the failure of a homestead settler to file the notice, as follows:

> * * * the claimant, in making homestead proof or submitting a showing of residence, cultivation and improvements as a basis for a free survey, shall not be given credit for such residence and cultivation as may have taken place prior to the filing of (a) a notice of the claim in the proper district land office, (b) a petition for survey, or (c) an application for homestead entry, whichever is the earlier.

43 U.S.C. § 270-6 (1970).

The above statutory and regulatory provisions concerning the effect of failing to file a notice of settlement make the only restriction, as far as we are aware, on the effect of failure to file a notice of settlement. Dean did not file a notice of settlement, but he did file a homestead application. Under the above provisions

he can be given credit for residence and cultivation from the time application to make entry is made. Thus, by implication there is a recognition that the final proof requirements for cultivation and residence can be satisfied after the application to make entry is filed but before formal allowance of the entry. There is clear recognition of this fact elsewhere in the regulations. 43 CFR 2511.4-2(a) provides that an entryman "may have credit for residence as well as cultivation before the date of entry if the land was, during the period in question, subject to appropriation by him or included in an entry against which he had initiated a contest resulting afterwards in its cancellation." 43 CFR 2511.3-4(a) provides that "final or commutation proof may be made at any time when it can be shown that there is a habitable house upon the land and that the required residence and cultivation have been had."

[3] The only question which arises from these regulations is the meaning of "subject to appropriation by him" in 43 CFR 2511.4-2(a). Some guidance can be gleaned by considering past rulings under the homestead laws. For years it was the rule within this Department to allow credit for a settler's residence on land while it was covered by a conflicting entry which was subsequently canceled. McDonald v. Jaramilla, 10 L.D. 276 (1890). In 1910 this was questioned and a general rule was stated that "credit for residence should not be allowed during the time that the land is not subject to entry by the person maintaining such residence * * *." Instructions, 39 L.D. 230, 231 (1910). However, it was indicated that cases arising

subsequently would be adjudicated upon each one's material facts. If a contestant settled upon land within an entry before it was canceled he would still be given credit for his residence during that time if the previous entry was subsequently canceled and the contestant was permitted to make homestead entry. Instructions, 43 L.D. 187 (1914). Regulation 43 CFR 2511.4-2(a) continues these basic rules. However, in determining conflicting rights where land within a homestead entry is canceled or relinquished, the Department has long and consistently recognized that the rights of a conflicting settler upon the entry attach immediately upon the termination of the entry and prevail over a subsequent settler or applicant for entry. Ernest J. Ackerman, supra; Bauer v. Neumberg, 46 L.D. 372 (1918). Generally the settler who is first in time prevails over any subsequent settler or applicant. An exception recognizes the statutory preference right of a contestant who procures the cancellation of an entry through a contest of the entry. Id. Aside from that, land within an allowed entry of record would not generally be considered as subject to appropriation by another.

Although for the purpose of the Howe, Pope, and Gunderson cases, supra, an application to make homestead entry in Alaska may be deemed the equivalent of an entry for certain purposes, as discussed previously, it does not preclude the inception of rights which can be recognized if the application is subsequently rejected or withdrawn. Thus, although a settler or subsequent homestead applicant takes a risk that a prior-filed homestead application will be allowed, until

that eventuality happens it cannot be said that the land is not subject to appropriation by a homestead settler. Whatever rights he may have are subject to being divested because of the prior right, but if that priority does not ripen into a vested right he may be able to appropriate the land and defeat subsequent claimants. The regulation applied existing law and did not change the law. Therefore, the term "subject to appropriation" does not refer to land for which there was a prior-filed homestead application which is subsequently withdrawn or rejected. It does not require rejection of a final proof asserting compliance with the homestead laws merely because prior-filed homestead applications remain of record. Adjudication of Dean's final proof was premature until action could be taken on his homestead application, and the decision is set aside as to the rejection of the final proof as well as the rejection of his application. 2/

[4] The fact that the final proof was filed before allowance of an entry also does not preclude consideration of the proof for that reason if entry is allowed. See Avy Page Bennett, 49 L.D. 153 (1922) (recognizing settlement prior to allowance of an entry and permitting proof to be made whenever the requirements of the homestead law were satisfied).

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2/ This action should not be interpreted as any ruling on the validity of the final proof. We are only concluding that it is premature to decide that issue in the circumstances of this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further action consistent with this decision.

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Joan B. Thompson
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Frederick Fishman
Administrative Judge